The Best of Both Worlds: The Use of Med-Arb for Resolving Will Disputes

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I. INTRODUCTION

A case recently before the Supreme Court involved a Playboy Playmate, a billionaire Texas oil tycoon, and his son.[1] The tycoon, J. Howard Marshall II, married the Playmate, Anna Nicole Smith, and then died fourteen months after their marriage.[2] After Marshall's death, the infamous Smith sued her stepson about the disposition of Marshall's estate.[3] Certainly, her late husband would not have anticipated this costly and time-consuming litigation, causing his wife and son to become bitter enemies. However, he should have considered the possibility of a courtroom battle because the situation that he created "has all of the ingredients of a spectacular fight: An enormous amount at stake, a disinherited child, a new wife who is not the mother of the children. 'That's the kind of case where you would say, "Anticipate a will contest."'"[4]

Although will contest proceedings are relatively rare,[5] they can be "long and financially draining battles that seldom achieve the results desired."[6]

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[1] David Stout, *Justices Hear a Drama Straight From Tabloids*, N.Y. TIMES, Mar. 1, 2006, at A14. The Supreme Court's decision was not about the specific disposition of J. Howard's assets, but whether the Texas probate court that ruled for the son in earlier will contest proceedings had exclusive jurisdiction over the matter. *Id.* This case illustrates one of the many situations in which a will contest can and is likely to occur.

[2] *Id.*

[3] For the intriguing details of J. Howard Marshall's and Anna Nicole Smith's relationship see JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 194 (7th ed. 2005).

[4] Carol M. Cropper, *She May Have the Last Laugh, and a Fortune*, N.Y. TIMES, Oct. 3, 1999, at C1.

[5] Dennis W. Collins, *Avoiding A Will Contest—The Impossible Dream?* 34 CREIGHTON L. REV. 7, 8 (2000). One study estimated that one out of every hundred wills is contested. *Id.* A respected probate expert still found this statistic troubling, commenting that "because . . . there are millions of probates per year, one-in-a-hundred litigation patterns are very serious." *Id.* (citation omitted).

[6] CCH Financial Planning Toolkit, Will Contests, http://www.finance.cch.com/text/c50s10d180.asp (last visited Jan. 31, 2007) [hereinafter *CCH*].

Because will contests usually involve fragile familial relationships,[7] it is important for lawyers to approach them with the necessary sensitivity. The growing number of "non-traditional" family structures has increased the prevalence of disputes involving decedents' wills.[8] Much commentary exists about whether it is ideal to litigate probate matters.[9] As such, the utility of alternative dispute resolution (ADR) as a way to handle will contests has become a topic of increasing interest in the legal world.[10]

Due to the flaws in the traditional process, mediation is a better alternative to litigation in will contests disputes.[11] Some jurisdictions even send litigants seeking a will contest to mediation *before* allowing them to litigate the matter.[12] Several considerations counsel in favor of utilizing mediation in this area, including, but not limited to, the "potential to avoid

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[7] *See, e.g.*, Dara Greene, Note, *Antemortem Probate: A Mediation Model*, 14 OHIO ST. J. ON DISP. RESOL. 663, 680 (1999). Relationships that need to be maintained are often the most fragile. *Id.*

[8] Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 417 (1997). Only 24% of American households are comprised of the "traditional" structure: married couples with children from their marriage. Kristen French, *The Post-Nuclear Age*, FINANCIAL PLANNING, Aug. 1, 2004, http://www.financial-planning.com/pubs/fp/20040801015.html. Instead, "[i]n their place is an ever-widening variety of households: Divorced parents, raising kids alone. Step-parents, sharing blended families. Adoptive parents. Same sex partners, with or without children. Grandparents caring for grandchildren. Adult parents caring for aging parents. And on and on." *Id.*

[9] *See generally* Andrew Stimmel, Note, *Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code*, 18 OHIO ST. J. ON DISP. RESOL. 197, 199 (2002).

[10] *See, e.g.*, Mary F. Radford, *Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters*, 1 PEPP. DISP. RESOL. L.J. 241, 242 (2001) (highlighting the advantages and disadvantages of ADR, specifically mediation, when dealing with these matters).

[11] *See generally* Stimmel, *supra* note 9, at 197 (explaining advantages of mediating will contests and proposing mandatory mediation in this arena). Some general reasons that people seek alternatives to litigating are: "(1) to relieve court congestion as well as undue cost delay; (2) to enhance community involvement in the dispute resolution process; (3) to facilitate access to justice; [and] (4) to provide more 'effective' dispute resolution." S. GOLDBERG ET AL., DISPUTE RESOLUTION 5 (1985).

[12] Ronald Chester, *Less Law, but More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 182 (1999). Fulton County, Georgia has employed this method and it has been successful reporting "a sixty-five percent success rate in mediating settlements of all contested matters." *Id.*

the costs, time delays, and the adversarial, winner-take-all atmosphere of litigation."[13]

Mediation does circumvent some of the difficulties that litigation creates for families involved in will contest disputes, but utilizing mediation also has serious shortcomings that should be considered.[14] These disadvantages include the fact that some of the most important benefits of mediation in these situations are eviscerated when participants come to an impasse.[15] In addition, power imbalances between mediating parties—which occur frequently in familial relationships—can affect the fairness of the result.[16]

The relatively controversial hybrid method of mediation and arbitration, "med-arb," has the potential to mitigate the downfalls of mediation in will contest proceedings. Med-arb mixes the guarantee of finality achieved through arbitration with the sensitivity encompassed by mediation.[17] Though med-arb has been widely criticized, those criticisms do not override its potential value in resolving will disputes.[18]

Although the application of med-arb to will contests has not been extensively explored in scholarly literature, the legal community should

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[13] Stimmel, *supra* note 9, at 197. Using ADR in the probate arena has more history than one might think. What today would constitute an ADR clause was contained in George Washington's will. He declared in his will that "[a]ll disputes . . . shall be decided by three impartial and intelligent men . . . and such decision is, to all intents and purposes, to be as binding on the parties . . . " Gary L. Schreiner, *Probate Mediation in Utah: Where did it Come From, Where is it Now, Where is it Going?*, UTAH BAR J., Aug.–Sept. 2002, at 22. Similarly, Abraham Lincoln anticipated the benefits of ADR and the shortcomings of litigation in many situations. He once wrote, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time." Gary D. Williams, Note, *Weighing the Costs and Benefits of Mediating Estate Planning Issues Before Disputes Between Family Members Arise: The Scale Tips in Favor of Mediation,* 16 OHIO ST. J. ON DISP. RESOL. 819, 819 (2001).

[14] Karen L. Henry, Note, *Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes*, 3 OHIO ST. J. ON DISP. RESOL. 385, 390 (1988).

[15] *Id.*

[16] Gary, *supra* note 8, at 433.

[17] *See* EDWARD A. DAUER, ADR LAW & PRACTICE § 8.4(f)(5) (2000) (describing med-arb as an ADR process). "In this process, the neutral functions first as a mediator, helping the parties arrive at a mutually acceptable outcome. If mediation fails, the same neutral then serves as an arbitrator, issuing a final and binding decision." GOLDBERG, *supra* note 11, at 275.

[18] *See* EDWARD J. COSTELLO, CONTROLLING CONFLICT: ALTERNATIVE DISPUTE RESOLUTION FOR BUSINESS 172 (1996) (providing a synopsis of the common criticisms of med-arb).

begin to regard the process as a way to handle challenges to wills. Part II of this Note explores the disadvantages of litigating will disputes and why ADR should be employed more frequently in this arena. Part III of this Note enumerates the reasons that mediation and arbitration are both inadequate on their own in this setting. Part IV describes med-arb generally, encourages its use in will disputes, and responds to scholarly criticism of the method.

II. WILL CONTESTS AND WHY THEY SHOULD NOT BE LITIGATED

The death of a loved one is difficult for anyone who has the misfortune to experience it. Coupling that grief with a lawsuit only has the potential to cause more stress on family members.[19] In addition to the bereavement and sense of chaos embroiled in these situations "is the possibility of family friction when the contents of the decedent's will are revealed. A bitter will contest can divide even the most secure families."[20] Nevertheless, will contest proceedings traditionally have taken place in the courtroom, and "like gun fighters, disputants 'face off' against each other and attempt to use the judicial system to impose their views or wills on each other."[21]

Litigating will contests usually produces unsatisfactory results and has the potential to tear families apart, causing emotional and financial stress on the parties involved.[22] The family's loss is often twofold if disgruntled

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[19] *See* Greene, *supra* note 7, at 663. When drafting their wills, many testators anticipate the possibility of a lawsuit regarding their will and include "no-contest clauses" in their wills. These clauses preclude any person who contests the will from inheriting anything under the will. An example of a no-contest clause is as follows: "If any beneficiary under this will contests this will or any of its provisions, any share or interest in my estate given to the contesting beneficiary under this will is revoked and shall be disposed of as if that contesting beneficiary had not survived me." MARY RANDOLPH, THE EXECUTOR'S GUIDE: SETTLING A LOVED ONE'S ESTATE OR TRUST § 6/19 (2004). The specific rules regarding no-contest clauses vary between jurisdictions, but the majority of jurisdictions honor them, at least some of the time. DUKEMINIER, *supra* note 3, at 167.

[20] Greene, *supra* note 7, at 663 ("The fact that most families wish to maintain or continue their present relationships, the probability that most participants have embarrassing intimate knowledge of each other, and the emotional attachment that participants have formed to items in questions are some of the many problems involved in family disputes."). *Id.* at 667 n.21.

[21] Williams, *supra* note 13, at 823. In fact, the "winner" in the lawsuit is often not satisfied because of the hostile manner in which he was forced to go about winning because he chose to utilize the adversarial system. *See id.* at 824.

[22] *CCH*, *supra* note 6. The financial stress that a will contest can impose upon a family can be significant.

members choose to litigate a will contest to the bitter end. First, the family stands to lose money, perhaps through the court's decision, or even because of the litigation costs that they incur.[23] Second, and even more devastating than monetary loss, is the potential for life-long damage done to familial relationships.[24] For these reasons, litigation is not the ideal way for lawyers to approach will contests.

Will contests are brought for a variety of reasons, but usually because those contesting the will believe that the testator was unduly influenced,[25] that the testator lacked the mental capacity to approve the drafting of the will,[26] on grounds of fraud or duress,[27] or the will contained some technical flaw.[28] In order to determine the outcome of a will contest, courts attempt to

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> [T]he cost of litigation can sometimes dwindle an estate down to nothing. The purpose of a will is to distribute the assets of an estate. A testator may think twice about initiating an action to preserve his will if the results will reduce the estate by depleting his current funds.

Greene, *supra* note 7, at 681.

[23] Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 REAL PROP. PROB. & TR. J. 601, 603 (2000).

[24] *Id.* Because of the problems with litigating will contests, antemortem probate—also known as living probate—is an alternative. This procedure

> [A]llows an individual to open his will to all charges of invalidation while he is still alive . . . If the testator is proved to have the necessary capacity and it cannot be determined that the testator was subject to fraud or unduly influenced, then the will stands as valid and protected from all further attacks after death.

Greene, *supra* note 7, at 663.

[25] *See* Chester, *supra* note 12, at 174–75. Family members often claim undue influence when they do not approve of the decedent's relationship with a beneficiary. Wills "involving a relationship between an older decedent and younger beneficiary, an unmarried heterosexual couple, a lesbian couple, or gay couple" are very often disputed. Gary, *supra* note 8, at 419.

[26] Chester, *supra* note 12, at 176. Both undue influence and lack of testamentary capacity are enmeshed with the testator's mental ability. Thus, "for testamentary capacity, the testator must have, at the time of the execution of the will, the capacity to know and understand: (1) the nature of his act; (2) the nature and extent of his property; and (3) his relation to those persons who are the natural objects of his bounty." *Id.* (citation omitted).

[27] Stimmel, *supra* note 9, at 202. A will is drafted fraudulently "when [it] has been brought about through lies told to the testator." *Id.* It is drafted under duress if the "will is brought about [by] threats of harm to the testator." *Id.* at 202–03.

[28] Chester, *supra* note 12, at 175. A technical flaw is defined as a lack of "compliance with applicable statutory requirements." *Id.* Failure to observe formalities

discern what the testator's true wishes were at the time that he drafted the will.[29] In fact, "judges . . . tend to rule in favor of the will proponents due in part to [the tendency to] uphold the testator's intent."[30]

Obviously, it is difficult to ascertain the wishes of the dead testator, as he is not present to affirm the court's conclusions.[31] False claims can be made with little difficulty procedurally and "[t]he added benefit of not having to confront the deceased while making a spurious claim can make the temptation even greater."[32] Thus, difficult issues emerge when dealing with contestants whose intentions are less than honorable, who make claims of undue influence or lack of testamentary capacity, including, but not limited to, the difficulty in producing evidence to prove or disprove these claims.[33]

An example of a situation in which it would be difficult to produce evidence to validate either side's claim is this hypothetical:

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may be more common than one may think. For example, "Many wills have been invalidated due to the fact that the testator did not secure the correct number of witnesses or sign the document at the correct spot." Greene, *supra* note 7, at 665; *see also* C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 U. FLA. L. REV. 167 (1991) (explaining will formalities and the changing law with respect to them).

[29] Chester, *supra* note 12, at 175.

[30] *Id.* One study found that the contestant won 5 in 22 times. *Id.* at 181. However, some commentators are wary of judges' motives even though they tend to favor proponents. "Courts claim that the testator's intent is their 'lodestar.' Yet, in practice, judges and juries manipulate mental capacity doctrines such as 'undue influence' and 'insane delusion' to reach results more in accord with the family paradigm," having superior respect for traditional family structures. Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 210 (2001).

[31] *E.g.*, Greene, *supra* note 7, at 664.

[32] *Id.* at 666. The fact that it is so easy to contest a will has become increasingly worrisome, although difficult to measure. "Synthesized by the greedy plots of disgruntled devisees and disinherited heirs, however, the will contest has taken on several new dimensions. These include attempts to prove lack of mental capacity, fraud, or improper influence where none existed for the sole purpose of taking a greater share of the bounty." Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 134–35 (1990).

[33] Greene, *supra* note 7, at 667. A case of a famous family claiming undue influence was the will contest brought by the Johnson & Johnson heirs. They claimed that their father was unduly influenced by his second wife, Basia, who was much younger than he was. Chester, *supra* note 12, at 189. "The contestants claimed that Basia dominated Seward [the father] with temper tantrums, sometimes berating him and calling him 'stupid old man.'" DUKEMINIER, *supra* note 3, at 182. The case eventually settled, and Basia is the seventy-fourth richest American with 2.6 billion dollars! *Id.* at 183.

> A widowed mother had two adult children. For the last year of her life, the mother moved in with one child while the other child lived far away. Shortly before her death, the mother changed her will. Whereas the will had previously divided her estate evenly between her two children, after the changes the will left everything to the child with whom she lived. After her mother's death, the disinherited child, suspecting some overreaching by her sibling, decides to challenge the will to claim her rightful share of her mother's estate.[34]

Because of the probable lack of evidence available to either side, or the fact that the parties most likely "have a variety of issues to work out between them, only some of which are legal in nature," litigation is not the best means for resolution.[35]

The abstract but complex consideration of "fairness" also often drives contestants' demands.[36] Family situations are fundamentally different from other situations that are often litigated because:

> While solutions to commercial disputes can often be worked out by applying a cost/benefit analysis, family disputes are much more complicated and much more subtle. Understanding the sometimes hidden origins of disputes in probate is necessary when analyzing whether and when mediation is an appropriate method to resolve the dispute.[37]

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[34] Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161, 163 (2002). The author used this hypothetical situation as an example of a dispute that would not be well suited for litigation for reasons including, but not limited to "highly charged emotional controversies among family members and . . . the unpleasant public disclosure of private facts." *Id.* Moreover, it would be hard, if not impossible, now that she has passed away, to determine who is telling the truth about the mother's mental state. Each party has something to gain by lying. This evidentiary problem attests to the insufficiency of litigation for these matters. *See* Greene, *supra* note 7, at 665.

[35] Madoff, *supra* note 34, at 163.

[36] Stimmel, *supra* note 9, at 200. Fairness is sometimes exemplified by the idea that "people equidistant in kinship from the deceased have in some sense equal claim on the estate." *Id.* This ideal, obviously, is not espoused universally by testators—evidenced by the numbers of contested wills, so embracing it has the potential to thwart the testator's true intentions. *Id.* ("The will contests may reflect the contestant's disapproval . . . at losing an expected inheritance to someone whose relationship with the decedent was viewed . . . as somehow improper.").

[37] *Id.* at 206–07. The author suggests that these "hidden origins" could include "sibling rivalry, grief at the loss of a loved one, sentimental values placed on certain items in the estate, and other emotional issues related to family dynamics." *Id.* at 206.

Sometimes the "hidden origins" of will disputes are intangibles which can be more significant than the money or property.[38] For example, a disputant's chief reason for bringing a will contest could be to prevent another family member from retaining property that is meaningful to him.[39] Thus a piece of furniture or heirloom perhaps not worth a significant amount of money, but with sentimental value, could resolve the dispute, putting an end to the situation without disrupting the family unit and without causing acrimony for years to come.[40] Courts are not as apt to craft these creative types of resolutions and compromises, and for that reason, litigating matters like these is not the optimal solution.[41]

Furthermore, in many states, settlement is strongly encouraged in cases relating to family issues, including probate disputes, and is known as the "family settlement doctrine."[42] Settlements are promoted "in situations where there is a reasonable or substantial basis for believing that prolonged or expensive litigation will result over the proceeds or distribution of an estate, the estate will be depleted, and family relationships will be 'torn asunder.'"[43] This encouragement of family settlement by the courts indicates

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These elements can have an disproportionate intrinsic value when compared to monetary value. *Id.*

[38] Brian C. Hewitt, *Probate Mediation: A Means to an End*, RES GESTAE, Aug. 1996, at 41, 43 ("Significant attachment to isolated items of personal property often represents the genesis of probate disputes. If those items of personal property can be identified and addressed to the satisfaction of all parties, the ultimate economic division of the family pie may become less important."). Similarly, "[a] child's tea set, for example, may have little monetary value extrinsically; to those family members whose childhood memories are filled with recollections of tea parties with grandma, however, the importance of the toy may rise to an extraordinary level." Stimmel, *supra* note 9, at 201.

[39] Stimmel, *supra* note 9, at 201.

[40] *See id.*

[41] Gary, *supra* note 8, at 429. The author points out that ADR is preferable because, by working together unique solutions which do not rely solely on facts and figures can be accomplished. As such, "a court's division of the property based on economic value would be far less beneficial to the parties than letting them work out a plan of distribution together." *Id.* at 430. The strength of mediation, because it gives participants the ability to craft their own solutions to problems, is also apparent with respect to other probate matters. Mediation can be useful to resolve differences about adult guardianship matters, which involve similar familial issues. The material difference between will contests and adult guardianship disputes, however, is that in guardianship matters, the person most affected by the outcome of the dispute—the elderly relative at issue—is usually not involved in its resolution. *Id.*

[42] Stimmel, *supra* note 9, at 219.

[43] *Id.*

that ADR processes would likewise be promoted and welcomed in these situations to avoid litigation.

Consequently, ADR, and more specifically mediation, has been proposed as a way to allow parties to a will contest to form a plan that is, in the best scenario, both amicable and fair; preserving family relationships while making the best effort to preserve the intent of the testator.[44] The following excerpt summarizes why ADR is valuable and is clearly applicable to will disputes:

> Too often litigation plans consist of reacting to the other side through a routine pattern of document discovery, fact witness depositions, and (un)dispositive motions. Full attention comes only as deadlines for experts and trial force the case to the front of a litigator's desk. Early assignment to ADR provides guidance to the parties on the crucial disputes and uncertainties that bar settlement and forces them to resolve those issues in a timely fashion.[45]

III. WHY MEDIATION AND ARBITRATION, WHEN USED ALONE, ARE INADEQUATE IN THE WILL CONTEST CONTEXT

Because of the aforementioned problems with litigating will contests, ADR processes—especially mediation—have become widely used and advocated in this area.[46] However, "[e]ven professional mediators have noted that will disputes are some of the most difficult disputes to resolve through mediation."[47] Similarly, the use of arbitration alone when dealing with will contests is inadequate.[48] This Part will explore the disadvantages of using mediation and arbitration alone in will disputes, but will explain how, when used together in med-arb, their disadvantages are virtually eliminated.

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[44] *Id.* at 205–06.

[45] Chester, *supra* note 12, at 203.

[46] Madoff, *supra* note 34, at 162. Nevertheless, one empirical study indicated that will contests are more likely to be settled through trial than other civil litigation. About 40% of the will contests over a nine year period were resolved by judge or jury decision, as opposed to the fewer than 8% of other civil litigation resolved through trial. Three reasons are proposed for the finding that will contests seem to be less likely to settle: "(1) the role of testator intent; (2) the opportunity for moral condemnation or vindication; and (3) the all-or-nothing nature of the remedy." *Id.* at 176–77.

[47] *Id.* at 164.

[48] *See generally* Henry, *supra* note 14 (discussing the utility of med-arb in contract negotiation disputes and why it is preferable to interest arbitration).

A. *Mediation*

Scholars have encouraged mediation as a way to protect will contestants from litigation, which can be exceedingly adversarial and expensive.[49] Mediation is defined as:

> [A] process in which an impartial third party—a mediator—facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. A mediator facilitates communication, promotes understanding, focuses the parties on their interests, and seeks creative problem-solving to enable the parties to reach their own agreement.[50]

Several reasons are cited which support mediating will contests: (1) mediation is more efficient with respect to both time and money;[51] (2) mediation is more private than litigation;[52] (3) mediation is more appropriate for dealing with emotional issues;[53] and (4) mediation endeavors to build, not break down relationships.[54] These reasons are powerful and certainly counsel in favor of utilizing mediation in dealing with will disputes. Nevertheless, several downfalls to using mediation alone exist, which make

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[49] *See generally* Stimmel, *supra* note 9 (explaining the advantages of mediating will contests and proposing discretionary mediation in this arena).

[50] Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 STETSON L. REV. 611, 617 (2002). The author goes on to highlight that the self-determination aspect is the most crucial part of mediation stating that, "[t]he mediator has no authority to impose a decision . . . but rather is there solely to assist the parties in resolving the dispute . . . . " *Id.*

[51] Stimmel, *supra* note 9, at 211 (citation omitted). Some costs that are avoided in mediation are court costs—court reporter and transcript fee—and attorneys fees. Time is saved because the informal atmosphere allows for more flexibility in scheduling the mediation. *Id.*

[52] *Id.* at 208. In the courtroom, revealing long-standing family feuds, or the testator's lack of acuity immediately before death can lead to immense embarrassment for the family. The potential for embarrassment may lead litigants to conceal important facts that they would not conceal in mediation. *Id.*

[53] *Id.* at 208–09 ("Sometimes a party is less concerned about the actual estate distribution than about having the opportunity to voice grievances. Hurt feelings and a failure to communicate among the surviving family often prove a greater barrier to resolving the disputes than do actual money concerns.") (citations omitted).

[54] Stimmel, *supra* note 9, at 210. Litigation pits parties against each other, while mediation encourages cooperation. *Id.*

it a less valuable tool and cause the literature advocating it to be less persuasive.[55]

The most significant disadvantage of mediation in the will contest context is that parties may still have to litigate their dispute if the mediation comes to an impasse.[56] Will contests are often extremely emotional proceedings, involving family members with relationships that are complex.[57] Mediation can fail in particularly contentious situations: "[T]he more entrenched parties are in their long-held positions, the less open they will be to compromise, and the less likely it will be that the mediation is successful."[58] Accordingly, impasse is more likely in this type of situation and significant advantages of mediation are lost.[59] Med-arb moderates mediation's weaknesses by eliminating the possibility of impasse and allowing participants to end their dispute more efficiently.[60] Med-arb ends with a binding decision if the mediation portion does result in impasse, so parties never have to resort to the extremely adversarial courtroom setting.[61]

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[55] *See generally* Henry, *supra* note 14.

[56] *E.g.*, Henry, *supra* note 14, at 390. Mediators can "suggest" resolutions, "but any final agreement is a product of compromise between the parties." *Id.* Med-arb, on the other hand, has been called "mediation with muscle" because the med-arbiter has more power. *Id.* That increased power, however, is a source of criticism, which will be discussed *infra* Section IV.C.

[57] *E.g.*, Stimmel, *supra* note 9, at 212.

[58] *Id.* In a case like this, where "family animosity has reached such a level that not even the most skilled mediator could successfully broker a mutually acceptable agreement," the author encourages litigation. *Id.* at 212–13. Similarly, and probably for some of the same reasons, some research has indicated that will disputes are more than likely to go to trial than other types of disputes, and settlement is rare. *See* Madoff, *supra* note 34, at 176. Reasons suggested to explain this phenomenon are: "(1) the role of testator intent; (2) the opportunity for moral condemnation or vindication; and (3) the all-or-nothing nature of the remedy." *Id.* at 177.

[59] Some commentators argue that value can be derived from mediation even if it does come to impasse. For example, in the collective bargaining arena, "a party, after bargaining to impasse, may implement unilateral changes that are reasonably comprehended within its pre-impasse proposals." Stephen F. Befort, *Public Sector Bargaining: Fiscal Crisis and Unilateral Change*, 69 MINN. L. REV. 1221, 1227 (1985). Thus, parties may make headway although they do not reach a complete agreement. This position supports the use of med-arb because the portions to which the parties agreed can be implemented into the final agreement and the issues on which they disagreed will be arbitrated. *See* Gerald F. Phillips, *Same-Neutral Med-Arb: What Does the Future Hold?*, DISP. RESOL. J., May–Jul. 2005, at 28.

[60] *See* Henry, *supra* note 14, at 390.

[61] *Id.* at 390–91.

Another reason that mediation, on its own, may not be the optimal method for dealing with will contests is that it may not account for power imbalances between mediating parties.[62] The mediator should be aware of potential inequalities, which can stem from "different levels of financial sophistication or different negotiating abilities . . . . Family dynamics may contribute to unequal bargaining power."[63] These disparities may lead to an uneven result: the more powerful party may be able to dominate, manipulate, or usurp the weaker party's power.[64] Also unsettling is the fact that a mediated agreement may be unfair, but often weaker parties still assent because of sheer intimidation.[65]

Although this power imbalance cannot be completely eliminated in med-arb, the weaker party is given more control when this method is used. "In med-arb . . . the weaker party is able to negotiate secure in the knowledge that if no mutually satisfactory agreement is reached, the med-arbiter will render a decision . . . . [T]he process does help ensure that weakness will not be a factor in and of itself."[66] Because the weaker party has another option than to succumb to the dominant party, med-arb assuages one of the most severe downfalls of using mediation alone.

Finally, because mediation requires listening and cooperating, particularly hostile family members may not be amenable to cooperating

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[62] Gary, *supra* note 8, at 432. *See also* Mary Kay Kisthardt, *The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them*, 14 J. AM. ACAD. MATRIMONIAL LAWYERS 353, 374 (1997) ("[P]ower imbalances may result from a lack of negotiating skills, domestic violence, or the use of intimidation.").

[63] Gary, *supra* note 8, at 433. Even if the mediator is aware of this imbalance, however, mitigating it can compromise her integrity as a mediator and thus "[m]ediators often feel torn between a commitment to help all parties and a desire to ensure that all can satisfy their interests fairly and effectively." John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 282 (2004).

[64] Radford, *supra* note 10, at 245.

[65] *E.g.*, Kisthardt, *supra* note 62, at 374. Unfair agreements were found in a study that measured lawyers' perceptions of mediation. *Id.* Some lawyers commented that "[c]lients become emotionally invested in the agreement they made and do not want to change it. This was particularly troubling if the attorney thought the client was intimidated into making the agreement in the first place." *Id.* The parties themselves, however, could only change the agreements. *Id.* This power imbalance is also present in the divorce context, as both areas of law deal with family matters. *See* Gary, *supra* note 8, at 399 (discussing that mediation is appropriate in disputes where power imbalances exist in family relationships).

[66] Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLAMETTE L. REV. 661, 682–83 (1991) (citation omitted).

with the process.[67] Thus, for parties to a will contest who are unable or unwilling to communicate, mediation may be an inadequate manner of dealing with their problem.[68] Although med-arb still requires participants to listen to one another, impasse is handled differently.[69] Even though the same problems with communication may be present, family members may prefer a process that is the middle of the road between litigation and mediation, and that is more efficient than litigation, but does not absolutely require cooperation, as mediation does.[70]

B. *Arbitration*

Arbitration is another type of ADR process that has been explored nominally in the family context.[71] Arbitration is defined as "an adjudicatory process in which disputants present proofs and arguments to a neutral third party who [sometimes] has the power to hand down a binding decision, generally based on objective standards."[72] Binding and non-binding models of arbitration exist, each with their own advantages and disadvantages, depending on the situation.[73] Because of the inherent disadvantages in using arbitration in will contests, it is not the ideal ADR mechanism to use alone in

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[67] Gary, *supra* note 8, at 441. The author suggests that sometimes, family members may not be willing to listen to each other because of "strongly held moral or religious beliefs." *Id.*

[68] *Id.*

[69] Bartel, *supra* note 66, at 675 (implying that in med-arb participants are aware that impasse could cause "an award to be issued.")

[70] Although no particular source indicates this potential preference specifically, it seems that it could be a persuasive argument in favor of med-arb.

[71] *See* Christine Albano, *Binding Arbitration: A Proper Forum for Child Custody?*, 14 J. AM. ACAD. MATRIMONIAL L. 419, 419–20 (1997) ("Since arbitration is still fairly new in the domestic area, many concerns still exist as to whether arbitration is really an appropriate process to determine sensitive issues . . . .").

[72] Henry, *supra* note 14, at 388 (citation omitted).

[73] *Id.* at 388–89. If binding arbitration is used, the arbitrator's decision can be overruled if there is evidence of

> (1) impartiality in the arbitrator's appointment or conduct, or (2) if the arbitrator exceeded his or her powers by refusing to postpone a hearing upon sufficient cause, or (3) if the arbitrator refused to hear evidence admissible for controversy. An arbitrator's award will not be vacated even for a mistaken interpretation of the law.

Albano, *supra* note 71, at 424 (citations omitted).

these situations.[74] Employed in tandem with mediation, however, arbitration is a functional tool to aid families in probate disputes.

The major problems with the use of arbitration alone in a will dispute are its adjudicatory nature[75] and its lack of efficiency.[76] Although arbitration is not as formal as adjudication, it does follow the same general style as a courtroom proceeding.[77] The process resembles a courtroom because "the arbitrator accepts evidence, listens to witnesses called by the parties, and hears the arguments of the parties."[78] This may not be the ideal setting for family disputes as it can feel adversarial, even if it is less formal than going to court.[79] Additionally, the added procedural requirements inherent in arbitration can increase the costs of the process.[80] To some, these aspects of the procedure can make it almost indistinguishable from litigation.[81]

Moreover, arbitration is criticized because of its lack of efficiency.[82] In fact, "the average time from grievance date to receipt of an arbitration award is over 200 days."[83] The most significant virtue of med-arb is its efficiency with respect to cost and time, making it preferable to the use of arbitration on its own in will contest proceedings.[84] Time is also saved because, "[t]ypically, during med-arb negotiations [the mediation portion of the process], the parties are brought closer together through offers and

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[74] *See generally* Henry, *supra* note 14. This article generally describes the downfalls of arbitration in comparison to med-arb, however, it does not discuss arbitration in the will contest context.

[75] *Id.* at 393–394.

[76] *Id.* at 393.

[77] Bartel, *supra* note 66, at 664.

[78] *Id.*

[79] Henry, *supra* note 14, at 390. In med-arb, no records or transcripts are taken, and any issues that the parties deem relevant are open for discussion, and if necessary, decision. *Id.* at 394. Thus, arbitration would seem as adversarial as if the dispute were taking place in the courtroom, which is not ideal. *See supra* Part II.

[80] Albano, *supra* note 71, at 425. One day of arbitration can cost up to $1000 per party. Henry, *supra* note 14, at 393 n.59. Some arbitration related costs "include: The arbitrators daily fee . . . ; the arbitrators travel time and study time . . . ; the fees for the parties' attorneys . . . ; rental of a hearing room; payment to the American Arbitration Association for furnishing the parties a panel of arbitrators . . . ; and stenographic transcription costs." *Id.*

[81] *Cf.* Albano, *supra* note 71, at 425 (arguing that litigation and arbitration are substantially dissimilar).

[82] Henry, *supra* note 14, at 393.

[83] *Id.* at 393 n.60.

[84] Henry, *supra* note 14, at 393.

counteroffers, so that if an issue does proceed to arbitration, the differences between the positions are often minimal."[85]

IV. THE BENEFITS OF USING MED-ARB IN WILL CONTEST PROCEEDINGS

Certain inadequacies lie in using mediation or arbitration alone to deal with a will contest proceeding.[86] Med-arb—an amalgamation of two types of ADR processes—can potentially mitigate those inadequacies and allow parties to a will dispute to come to a fair and amicable result.[87] This Part will first give an overview of med-arb, after which med-arb will be applied to will contests. Finally, the criticisms of med-arb will be discussed and rebutted with respect to will contests.

A. *Overview of Med-Arb*

Mediation and arbitration are two diverse ADR processes. Their dissimilarity lies in the principle "that in mediation the parties themselves decide what the resolution to the problem is, whereas in arbitration the arbitrator makes that determination."[88] Med-arb, a hybrid of the two methods, is a fairly new ADR process dating back only to the 1970s.[89] Med-arb capitalizes on the advantages of both mediation and arbitration, while eliminating many of their disadvantages.[90] Med-arb derives the most from

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[85] *Id.* at 394.

[86] *See generally id.* (highlighting disadvantages of using either mediation or arbitration alone and contrasting them with med-arb).

[87] Phillips, *supra* note 59, at 26. Lawrence Waddington, a retired Los Angeles Superior Court iterated, "med-arb is a valuable addition to the constantly maturing world of alternatives to litigation . . . the increasing use of mediation by the Bar has developed experienced lawyers who recognize a variety of techniques to settle cases and med-arb is one option." *Id.*

[88] Bartel, *supra* note 66, at 663.

[89] *Martindale Hubbell ADR Primer: Service Role—Mediation-Arbitration*, MARTINDALE HUBBELL, 2001, at 1, *available at* http://www.martindale.com/pdf/med-arb.pdf (hereinafter *Primer*). Med-arb was first encouraged in the United States by the Federal Impasse Services Panel. MEGAN E. TELFORD, MED-ARB: A VIABLE DISPUTE RESOLUTION ALTERNATIVE 1 (2000).

[90] *E.g.*, *Primer*, *supra* note 89, at 1. The term was first introduced by Sam Kagel and John Kagel. Sam Kagel & Bette J. Roth, *Med-Arb*, *in* THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 37:2 (Bette Roth, Randall W. Wulff & Charles A. Cooper eds., 2005) [hereinafter *Guide*] (referencing Sam Kagel & John Kagel's

both processes because, "[m]ediation has the advantage of allowing for resolutions rather than decisions. Arbitration has the advantage of guaranteeing that the matter will be ended when the procedure is over. Med/arb is a combination of the two which attempts to capture the benefits of both."[91] Med-arb is used most frequently in "public sector 'interest' disputes."[92] However, more recently, the scope of use has expanded to other types of cases including, but not limited to, cases involving family law.[93]

In med-arb, the participants agree to be parties to mediation,[94] and if the mediation comes to an impasse, a final settlement will be reached through arbitration.[95] In some cases, only part of the dispute is resolved in the mediation. That which is decided in the mediation is combined with the arbitrator's decision to form the end result.[96] The fact that the process is voluntary is important and can reduce its disadvantages.[97] This is because "[w]hen the parties know the characteristics of the process and accept it voluntarily, they are less likely to undermine the result, even when not completely satisfied with it."[98]

In traditional med-arb, the "med-arbiter" acts as both a mediator and an arbitrator.[99] This med-arbiter is chosen by the parties to the dispute and their

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November 1972 article *Using Two New Arbitration Techniques*). Kagel first utilized med-arb in the context of a notorious nurse's strike in the 1970s. TELFORD, *supra* note 89, at 1.

[91] DAUER, *supra* note 17, § 8.4(f)(5).

[92] ALAN S. RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 893 (2002).

[93] *See* DAUER, *supra* note 17, § 8.4(f)(2). Labor disputes were resolved by med-arb in its early history. Bartel, *supra* note 66, at 670. Med-arb is advocated for use in contract negotiation disputes. *See generally* Henry, *supra* note 14. It is suggested for international commercial dispute resolution. *See generally* Emilia Onyema, *The Use of Med-Arb in International Commercial Dispute Resolution*, 12 AM. REV. INT'L ARB. 411 (2001).

[94] Although participation is usually voluntary, some states have mandated the use of med-arb. A 1978 Wisconsin statute mandated mediation in collective bargaining talks between government entities and their employees. Similarly, San Francisco has adopted a similar practice for disputes with police and fire fighters. *Primer*, *supra* note 89, at 1.

[95] *E.g.*, PETER LOVENHEIM & LISA GUERIN, MEDIATE, DON'T LITIGATE § 8/8 (2004).

[96] *Primer*, *supra* note 89, at 1.

[97] Bartel, *supra* note 66, at 689.

[98] *Id.* at 691. Moreover, "[a] degree of coercion within the med-arb process is productive as long as there is no coercion to utilize med-arb." *Id* at 690.

[99] *E.g.*, Bartel, *supra* note 66, at 666. There are some departures from the traditional form of med-arb. The "contingent form" of med-arb allows the parties to decide, after the mediation, whether they want to continue on with the same neutral or select another. *Id.* Four other variations are also commonly used. "Nonbinding Med-Arb" follows the same

attorneys.[100] In most cases, the parties should choose "a neutral who must be skilled in both processes in order to guide parties through the mediation phase, preside over the arbitration [if the mediation comes to an impasse], and render a final, binding decision."[101] The med-arbiter should have experience conducting arbitrations and mediations, in addition to experience with the subject matter, because the med-arbiter essentially plays two roles in the med-arbitration if the mediation comes to an impasse. [102] This may be challenging because "[t]he morality of mediation lies in optimum settlement . . . [and] [t]he morality of arbitration lies in a decision according to the law . . . ."[103] Med-arb has been widely criticized, as will be discussed later, but the position that taking a "dual role" does not affect the quality of the process is still widely accepted.[104]

Med-arbiters can use two different types of approaches—directive or flexible—or adopt a method somewhere in the middle.[105] The directive approach involves the med-arbiter setting up guidelines and boundaries for the parties prior to the med-arbitration.[106] This includes dictating elements like when the caucuses will be held, and determining when the parties come

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process as regular med-arb, except the arbitration portion is not binding. "Med-Arb Show Cause" also follows a similar model except the med-arbiter's decision in the arbitration phase is viewed as a proposal which the parties critique and 'show cause' as to why the arbitrator's decision is not appropriate. After their criticism, the med-arbiter decides the case again. In "Medaloa," or Mediation and Last-Offer Arbitration, the arbitrator chooses between the last offers of the two parties if the mediation comes to an impasse. Finally, in "Post-Arbitration Mediation," the arbitration is performed before the mediation, but the binding decision is rendered after both processes are over. TELFORD, *supra* note 89, at 14–15.

[100] *Primer*, *supra* note 89, at 2.

[101] *Id.* at 1. A med-arbiter may also be called upon to make factual determinations. "If there are a lot of conflicting facts, it becomes the job of the neutral to sort them out and make pertinent findings." Chris Manos & Carson Taylor, *Dispute Resolution Options Open Doors to Amicable Settlements*, MONTANA LAWYER, Jan. 1998, at 38.

[102] *Guide, Selecting the Med-arbitrator*, *supra* note 90, § 37:4.

[103] Henry, *supra* note 14, at 396 (quoting S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 19 (1985)).

[104] *See id.* at 397. Some med-arbiters allow the process to move from mediation to arbitration, and then back to mediation if the parties so desire, which is touted as one of the attractive aspects of med-arb, as it attests to the process's flexibility. Phillips, *supra* note 59, at 26. "For example, if the parties learn that the arbitration may take a long time to be completed, that could be enough of an incentive for the parties to give mediation another try." *Id.* at 28.

[105] TELFORD, *supra* note 89, at 7.

[106] *Id.*

to an impasse.[107] Flexible med-arbiters do not set boundaries unless they determine they will be necessary in a particular med-arbitration.[108] At that point, the boundaries are mutually determined by the parties.[109] Since these positions clearly oppose one another, "many commentators believe that the best approach is to be found somewhere in the middle."[110]

Parties are encouraged to choose a med-arbiter that "they respect and trust."[111] The med-arbiter should be able to retain that trust throughout the process, possessing "interpersonal skills [that] are so strong that the parties want to have him or her decide the dispute if they cannot settle it themselves."[112] This is because the parties, to some extent, are "negotiating with the med-arbitrator during the mediation" portion of the process.[113] The complex and difficult role of the med-arbiter indicates that the parties should choose their med-arbiter with care.[114]

Another procedural issue that should be resolved prior to beginning med-arb is that the parties should sign a written agreement regarding the med-arbitration.[115] First, it is imperative that the parties are apprised of the ethical concerns that have been raised with respect to med-arb by the neutral.[116] Additionally, the neutral should "ask the parties and their counsel to sign a stipulation as to their knowledge of the risks of the process and a waiver agreeing to forego the right to disqualify the neutral and challenge the award."[117] Other areas suggested for coverage in the agreement are "the precise issues to be decided [and] the ground rules for the process . . . ."[118]

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[107] *Id.* Depending on strength of the case, directive med-arbiters sometimes direct parties to the med-arbitration, "letting them know whether it 'would be wise to allow the dispute to continue to arbitration.'" *Id.*

[108] *Id.* Some say that this approach is best because "there is less chance that the settlement negotiated under [directive] circumstances will be implemented and followed voluntarily, as the disputants may be angry with the way it was forced upon them." *Id.*

[109] TELFORD, *supra* note 89, at 7.

[110] *Id.* at 8.

[111] Phillips, *supra* note 59, at 30. "[M]any of the complaints surrounding the med-arb process are really concerns about possible abuse of process by the med-arbiter." TELFORD, *supra* note 89, at 7.

[112] Phillips, *supra* note 59, at 30.

[113] Bartel, *supra* note 66, at 688.

[114] *Id.* at 689.

[115] *Primer*, *supra* note 89, at 1.

[116] Phillips, *supra* note 59, at 30–31.

[117] Phillips, *supra* note 59, at 31. The *California ADR Practice Guide* contains an example of such a waiver. It states: "The parties understand that this process will likely cause the arbitrator to receive information that might not otherwise have been received as

B. *Applying Med-Arb to Will Contests*

Will disputes are situations that require unique legal solutions which take into consideration the family's fundamental goals. Med-arb is such a solution for many reasons, including but not limited to its efficiency and flexibility.[119]

One of the chief reasons that med-arb is preferable to the use of mediation or arbitration alone in will contest cases is that these disputes have the potential to be so contentious that they are often not resolved by mediation, as mentioned above.[120] One commentator noted, "there is no form of civil litigation more acrimonious and more conducive to the public display of soiled linen and the uncloseting of family skeletons than is the will contest."[121] An undesirable result of mediation would be that the litigation that the participants endeavored to avoid becomes necessary.[122] The med-arb process allows the parties to benefit from the advantages of compromise through mediation, while at the same time being certain that litigation will be avoided.[123] If the mediation in a med-arb proceeding is successful, participants can reap the many benefits of that procedure while avoiding the downfalls (i.e., specifically, having to resort to litigation), which is the ideal situation for will contestants.[124]

Perhaps a reflection of med-arb's utility in family disputes, the practice has been encouraged as a way to deal with high conflict divorce cases, which are strikingly similar in many respects to will contest disputes. [125] These

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evidence in the arbitration and to receive information confidentially from each of the parties that may not be disclosed to the other side." *Id.*

[118] *Primer*, *supra* note 89, at 1. Some examples of ground rules that the parties may set are "[w]hether the issues must be decided according to specific state or county laws" or "[w]hat restrictions, if any, will be placed on the types and amounts of monetary awards." *Id.* at 2.

[119] Phillips, *supra* note 59, at 28.

[120] *See generally* Stimmel, *supra* note 9, at 213.

[121] David F. Cavers, *Ante mortem Probate: An Essay in Preventative Law*, 1 U. CHI. L. REV. 440, 441 (1934).

[122] *E.g.*, Henry, *supra* note 14, at 390.

[123] *Id.*

[124] *See id.*

[125] DAUER, *supra* note 17, § 7.2(b)(2)(C). Family disputes—including those involving divorce and probate matters—have been called "a paradigm for the useful application of mediation." Gary, *supra* note 8, at 401. Moreover, probate cases have been called "family law cases in a nutshell." Schreiner, *supra* note 13, at 22. *See generally* Madoff, *supra* note 34, at 161–62 (discussing the fact that although the two types of

types of disputes are analogous for myriad reasons. First, both types of disputes involve familial relationships, which, if ruptured, can have a serious emotional toll on all parties involved.[126] In addition, when families argue, unlike in other kinds of disputes, they have to deal with one another after the dispute subsides.[127] Moreover, if parties have an existing relationship, med-arb is considered to be even more successful because "[i]n mature relationships, rights eventually give way to interests, mutual goals, and a living relationship. Procedures become less binding and standards of conduct and fairness become paramount."[128]

Furthermore, as our society changes and nontraditional family structures become widespread—the most prevalent structure being divorced families[129]—family disputes over wills become more common. Indeed, "[s]ociety does not have clear equidistant rules when stepfamilies or second spouses are involved."[130] The issues that are involved in high conflict divorces are embroiled in battles over the decedent's will, thus the two types of disputes should be handled similarly.[131] If med-arb has been suggested in divorce cases, it should be looked at more thoroughly with respect to will contests.

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disputes have many similar aspects, mediation is used less often in will disputes than in divorce disputes).

[126] *See* Dennis P. Sacuzzo, *Controversies in Divorce Mediation*, 79 N. DAK. L. REV. 425, 426 (2003).

[127] *See id.*

[128] TELFORD, *supra* note 89, at 6. Med-arb may be the best fit for this type of situation because "critics feel that making med-arb available to parties without knowing if the relationship that is necessary to make the procedure work exists is potentially dangerous." *Id.* at 7. A will contest is not this type of situation.

[129] *See* Sacuzzo, *supra* note 126, at 427. "Established scholars . . . have shown that inheritance rules fail to recognize the full range of today's families . . . that current law retains such an outdated definition of family that it denies donative freedom, frustrating even testamentary directives regarding funeral and burial arrangements." Foster, *supra* note 30, at 201–02. "[M]any families are 'nontraditional arrangements consisting of single parent units resulting from divorce and unmarried motherhood, step-families, grandparent-grandchild units, senior citizen group homes, pseudo-parent-child units, and unmarried heterosexual, lesbian and gay family units.'" Jennifer T. McGrath, *The Ethical Responsibilities of Estate Planning Attorneys in the Representation of Non-Traditional Couples*, 27 Seattle U. L. Rev. 75, 76 (2003).

[130] Gary, *supra* note 8, at 417 (stating that society continually disputes what stepfamilies are entitled to, indicating the complexities and potential bitterness that modern situations may bring in the will contest context).

[131] *See id.* Moreover, practitioners have often used divorce disputes as a model for resolving will contest disputes. *See also* Madoff, *supra* note 34, at 163 ("Mediation has become a widely used method for settling divorce disputes, and based on this success,

Even though will disputes are acrimonious, leading to a high likelihood of a breakdown in communication during the mediation, utilizing med-arb may actually cause parties to a dispute to take the mediation portion of the process more seriously if they know that their failure to resolve the problem will result in the arbiter doing so in their stead.[132] Thus the mediation is not only perceived by participants as an exercise to vent their feelings, but as a prelude to a potentially binding settlement.[133] In the context of will disputes, this is likely to encourage productive mediation, and certainly gives parties an incentive to resolve their dispute amicably, whereas if their alternative were litigation, there would not be the same feeling of *immediate* pending resolution.[134] Failure to come to agreement through mediation alone may be seen as a way to buy time or to postpone settlement.[135]

Accordingly, the ideal outcome of med-arb, particularly when used to resolve family disputes, is that all issues will be resolved during the mediation stage.[136] However, if the parties are unable to reach a resolution, and the process moves to arbitration, it is more efficient to employ traditional med-arb, which entails retaining the same neutral to conduct the mediation and arbitration, than to pursue the two procedures individually.[137] The med-arbiter in the arbitration portion is already appraised of the situation so preliminary work that would otherwise be involved is eliminated.[138] "To find

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there has been great interest in encouraging the use of mediation to resolve will disputes.").

[132] Henry, *supra* note 14, at 390. Not much research on med-arb exists, but "[a] 1995 study . . . found that the parties were substantially better motivated to settle their dispute under med-arb because they knew that the third party could eventually arbitrate and 'wanted to avoid loss of control over their destinies.'" TELFORD, *supra* note 89, at 3.

[133] *Id.*

[134] *See id.*

[135] This is my own assumption, although no scholarly article or book has confirmed it, as far as I know.

[136] Some reports state that most cases in med-arb are solved in the mediation phase. TELFORD, *supra* note 89, at 2. But contrary findings also exist. In Wisconsin, between 1978 and 1983, only 50% of the med-arb cases were settled during the mediation phase. Reasons offered for mediation's failure were that "one side was supremely confident that it had a winner; [t]he issue involved something that [was] regarded as a basic philosophical point [under which] one party would prefer to lose rather than make the compromise; [and] bargainers [had] no flexibility or authority to move." Henry, *supra* note 14, at 395 (citation omitted).

[137] Carlos de Vera, *Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 149, 156 (2004).

[138] *Id.*

an adequate resolution in the arbitration phase of the process, the Med-Arbitrator will use his understanding of the relationship between the parties during the mediation phase, or use his prior knowledge of their respective underlying interests."[139] Having the neutral function as both mediator and arbiter not only saves the participants time, but it also can save them money. Since the med-arbiter is already an "expert" about the situation, it is more cost efficient to have that person make the final decision on the matter if necessary, instead of paying another person to do so.[140]

One concern that should be weighed when considering whether to use med-arb, or ADR at all, in will contest matters is that the solution to which the parties come may be contrary to what the testator originally intended.[141] Our legal system puts a huge emphasis on testamentary intent, thus subverting that intent would seem to be a departure from established law.[142] One way to reconcile this issue is to consider that:

> [S]hould the testamentary disposition be concluded as the testator intended, the beneficiaries become owners of the property and are then free to do with it as they see fit. Since we would have no objections if parties then engaged in negotiations to alter that distribution (a mutually agreed-upon swap), it becomes less of a problem to think of beneficiaries engaging in mediation [or med-arb] prior to the actual distribution.[143]

C. *Responding to Criticisms of Med-Arb*

Med-arb is controversial and its critics have even gone so far as to contend that when blended, each individual process is less useful to participants.[144] One critic suggested that "[s]ome arbitrators and mediators

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[139] *Id.* at 156–57. The author considers this one of the strongest advantages of med-arb. *Id.* at 157.

[140] *E.g.*, COSTELLO, *supra* note 18, at 172.

[141] Stimmel, *supra* note 9, at 213.

[142] Miller, *supra* note 28, at 175. *See also Volmer v. McGowen*, 99 N.E.2d 337, 339 (Ill. 1951) ("The cardinal rule of testamentary construction to which all other rules must yield is to ascertain the intention of the testator from the will itself and effectuate this intention, unless contrary to some established rule of law or public policy.").

[143] Stimmel, *supra* note 9, at 213.

[144] COSTELLO, *supra* note 18, at 171. As a response to the criticism, some scholars have suggested simply changing the process's name. "Med-arb has a bad name and has a bad reputation, regardless of whether that reputation is deserved or undeserved. That perception makes it that much harder to sell, at least under that name." Gerald F. Phillips, *It's More than Just 'Med-Arb': The Case for 'Transitional Arbitration,'* 23 ALTERNATIVES TO HIGH COST LITIG. 141, 141 (2005).

believe that mixing mediation and arbitration is heretical and even unethical . . . ."[145] These contentions usually rest upon the premise that each process is intrinsically different—each representing different values—so mixing them effectively diminishes each set of values.[146] Two criticisms regarding med-arb are that the med-arbiter is too powerful and that med-arb does not encourage parties to be honest about the situation at hand.[147] These criticisms of med-arb do not necessarily apply to all situations in which med-arb is utilized.[148] Specifically, they do not make it a less attractive process in the will contest context.

The first criticism of med-arb is that the process is unfair because the med-arbiter is armed with too much information and thus is too powerful because the med-arbiter is privy to confidential information about not only facts of the case, but to the parties' interests.[149] "It has been argued that the med-arbiter cannot successfully block out information learned through mediation when determining an award as an arbitrator" and thus he cannot be impartial if the situation results in arbitration.[150]

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[145] Phillips, *supra* note 59, at 26. The author analyzes the problem with this contention:

> When I sit as an arbitrator pursuant to a contractual arbitration provision, I find that attorneys have rarely tried to mediate . . . until I mention that possibility. Many courts around the country require judges to send cases to mediation before the cases are to be tried. Why should not an arbitrator do the same?

Id. at 27.

[146] COSTELLO, *supra* note 18, at 171–72.

[147] *See generally* Henry, *supra* note 14, at 397 (arguing that parties do not 'divulge' information fearing the med-arbiter would use it in court).

[148] *See id.*

[149] *See* DAUER, *supra* note 17, § 8.4(f)(5); *see also* TELFORD, *supra* note 89, at 4. In fact, the American Arbitration Association (AAA) does not advocate med-arb "except in unusual circumstances because it could inhibit the candor which should characterize the mediation process [and] it could convey evidence, legal points or settlement positions [ex parte] improperly influencing the arbitrator." Phillips, *supra* note 59, at 27. Nevertheless, if parties indicate a desire to utilize med-arb, the AAA will manage the case with that process. *Id.*

[150] Henry, *supra* note 14, at 397; *see also* Phillips, *supra* note 59, at 27. One commentator noted the onus placed on a med-arbiter:

> When you sit there with the parties, separately or together—listening, persuading, cajoling, looking dour or relieved—your responsibility is a heavy one. Every lift of your eyebrow can be interpreted as a signal to the parties as to how you might eventually decide an issue if an agreement is not reached.

Bartel, *supra* note 66, at 688.

Some critics even go so far as to say that the same med-arbiter should *never* be used to perform both processes because during the mediation, participants could become concerned about the "neutral's integrity and grasp of the issues," or even his "intelligence or . . . neutrality," and for that reason request another neutral to perform the rest of the med-arbitration.[151] These concerns often arise from participants' suspicion that the med-arbiter will not utilize properly the confidential information with which he is armed.[152] Many commentators fear that the use of the same med-arbiter will also encourage the use of "heavy pressure tactics" to reach a solution as a mediator, thus making the arbitration part of the process "a foregone conclusion."[153]

First and foremost, employing a different neutral for the arbitration and mediation takes away from the efficiency of the process—if this modification were to be made, some of the most attractive attributes of med-arb would be eliminated.[154] Studies have shown that using a different party for the mediation and arbitration can actually be less effective.[155] In one study where a mediator also arbitrated (traditional med-arb), "disputants made fewer angry or hostile comments and fewer invidious comparisons. They also proposed more new alternatives for dealing with the issues."[156] In contrast, when the two processes were conducted with different neutrals, "the

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[151] COSTELLO, *supra* note 18, at 173.

[152] TELFORD, *supra* note 89, at 4. "[I]f parties disclose their bottom line, that information cannot be erased 'but must inevitably affect the award . . . . Thus full-born mediation may pose both a serious impediment to the independent judgment of the arbitrator and a real risk for the parties.'" *Id.*

[153] *Id.* at 3. This is why, critics of med-arb say, "[i]t is impossible for an overactive mediator-arbitrator to maintain the appearance of neutrality in any particular dispute." *Id* (citation omitted).

[154] *See* Bartel, *supra* note 66, at 681. Med-arb's supporters frequently tout the efficiency of the process as one of its chief advantages over other ADR processes. If a different neutral were used for each process, both would have to be paid, thus eliminating the cost-saving part of the process's economic efficiency. TELFORD, *supra* note 89, at 2.

[155] Bartel, *supra* note 66, at 681. This research has been limited, but conclusive. *Id.*

[156] *Id.* Some concern has been voiced that the arbitrator will propose solutions, thus taking away the parties' autonomy to resolve the problem. One arbitrator contradicted this:

> Creating and suggesting solutions for the parties would be stepping way beyond my role as mediator. Not only is it not a good idea, since I might not understand what the best solution is under the circumstances, but it is also really unfair to the parties, since it puts them in a position of having to reject them.

TELFORD, *supra* note 89, at 10.

mediator was less active and less involved than under either straight mediation or med-arb."[157]

The fact that the med-arbiter has power should not necessarily be considered a negative. The "muscle" that the med-arbiter has may actually encourage more productive mediation, as parties are aware of this power and know that it will be exercised if they cannot agree to a solution to their dispute.[158] This knowledge could potentially influence their productivity in the mediation portion of the process.[159] Furthermore, in response to the fear that med-arbiters would apply too much pressure in the mediation portion of the process, one study concluded that "most of the mediators [observed] were not highly directive. Their pressure tactics tended to be concentrated at the end of the sessions, suggesting a last ditch effort to rescue a failing mediation rather than a policy of forceful advocacy."[160]

Another criticism of med-arb is that parties will be reluctant to be as honest as possible in the mediation because of concern that exposing their positions will weaken them in the arbitration.[161] The underlying reasoning for this is that "[w]hile mediation requires candor between a party and the neutral, arbitration requires advocacy."[162]

Advocates of med-arb contend that this information would only affect an "incompetent" med-arbiter.[163] It has been suggested that:

> [C]onfidential information acquired in mediation is no more a risk in a[n] arbitration than a situation in which an arbitrator or a judge has to consider the admissibility of evidence. Even if it has already been heard by the third party, if the evidence is deemed to be inadmissible, a competent arbitrator

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[157] Bartel, *supra* note 66, at 681. Two explanations were offered for this phenomenon: "(1) that the mediators felt less responsible for the outcome because the dispute would be turned over to someone else to decide if they could not reach agreement; and (2) that the mediators may have been demoralized with little power in comparison to the potential arbitrator." *Id.*

[158] *See id.* at 679. "Curiously, I found that parties behave better during same-neutral med-arb than in classic mediation. This is probably because they do not want to alienate the potential arbitrator." Phillips, *supra* note 59, at 30.

[159] Phillips, *supra* note 59, at 30.

[160] TELFORD, *supra* note 89, at 3. This study also found that when studying mediation, arbitration, and med-arb, the med-arbiter was actually the least forceful. Moreover, mediation was found to "go more smoothly under med-arb than under straight mediation or mediation and arbitration by different persons." *Id.*

[161] *E.g.*, Henry, *supra* note 14, at 397.

[162] DAUER, *supra* note 17, § 8.4(f)(5).

[163] TELFORD, *supra* note 89, at 5.

> will know to discard it, and it will play no part in the final decisionmaking.[164]

Moreover, if both parties are committed to resolving the dispute, the mediation will most likely be viewed as the most beneficial forum for resolution, as they are able to mold their own solution to the problem instead of adhering to an imposed solution.[165] Being dishonest in the mediation is not behavior conducive to settlement.[166] In addition, the voluntary nature of the process signifies that concealment of facts is unlikely.[167] Voluntary entry into the process indicates that participants know about the process and will trust the med-arbiter to comport him or herself professionally, and they will cooperate by avoiding using strategies that are harmful to the process.[168] If parties really are concerned about dishonesty, the med-arb agreement can specifically mandate that each party reveal all pertinent information to the other party.[169] Thus, this purported downfall to med-arb is not necessarily as much of a shortcoming as critics portray it to be.

Because med-arb is a relatively new process, and because it has been criticized so much, it is not a surprise that it is not utilized more. One med-arbiter commented that many who criticize med-arb are viewing it theoretically, thus "[i]n the theoretical model, people, usually people who have never done it before, are very afraid of med-arb. In reality this does not make sense. Especially with all variations on the main theme and the flexibility of it, there is no real reason not to try it."[170]

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[164] *Id.* "Similarly, a competent med-arbiter will be able to overcome the problem of parties who are tempted to restrict information during mediation: 'he or she will be able to . . . check out or properly prove any confidential information without betraying necessary confidence.'" *Id.*

[165] Gary, *supra* note 8, at 401.

[166] *Id.*

[167] TELFORD, *supra* note 89, at 5. Some jurisdictions have mandated med-arb in certain situations and it has been proven less successful. However, med-arb, for the most part, is voluntary. For that reason, participants are more likely to take the process seriously if they agree to enter into it in the first place. *See* Henry, *supra* note 14, at 395.

[168] *See generally* TELFORD, *supra* note 89, at 5. The problems with confidential information are not as relevant in jurisdictions that do not "rely heavily on private caucusing." *Id.*

[169] Bartel, *supra* note 66, at 686–87.

[170] TELFORD, *supra* note 89, at 14.

V. CONCLUSION

Litigating will contests may be disadvantageous for the parties involved for reasons including the high cost and the potential for souring family relationships.[171] The financial losses families may experience because of litigating these matters can be extremely serious.[172] More serious, however, is the impact that taking a will contest dispute to court can have on relationships.[173] The adversarial system is more likely to pit family members against one another, causing long-term animosity which would not be there if the situation were handled differently.[174] Mediation has been suggested and recommended as a way for parties to avoid litigation and all of the negative aspects of exposing families to the perils of the courtroom.[175] However, for many reasons, mediation, although a better alternative, may be an imperfect solution to the problem.[176] Utilizing the relatively new process, med-arb, in the will contest context could potentially mitigate the downfalls of mediation and provide will contestants with a forum to resolve their problems once and for all. Although this process is not a panacea for dealing with will disputes, in many cases it could be the most efficient solution, while still preserving precious familial relationships.[177]

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[171] *E.g.*, Stimmel, *supra* note 9, at 197.

[172] *See* Radford, *supra* note 23, at 603.

[173] *See id.*

[174] *See id.*

[175] *See, e.g.*, Chester, *supra* note 12, at 177.

[176] *E.g.*, Stimmel, *supra* note 9, at 213.

[177] *See* Phillips, *supra* note 59, at 27.